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JOHN R. SCHOEMER, JR.
OF COUNSEL

May 10, 1985

BY HAND

John J. Kirby, Jr., Esq.
Mudge, Rose, Guthrie, Alexander
& Ferdon
180 Maiden Lane
New York, New York 10038

Re: Universal v. Nintendo

Dear John:

When we spoke on Wednesday, I told you that I had just received the transcript of Mr. Di Muro's deposition and quite a few of Mr. Di Muro's time sheets for the five-year period you requested during the course of his deposition. I have now reviewed these, plus Mr. DiMuro's steno pads and am enclosing with this letter those entries which you requested and to which I believe you are entitled, plus the other documents you requested during Di Muro's deposition. I also noted that I had some documents which I would identify for you but objected to producing on the grounds that they represented communications between attorneys for Universal and were therefore privileged. I will turn to these in a moment, but will first deal with your request for information extracted from Di Muro's various diaries.

Document Request

Mr. DiMuro's steno pads - all references to Donkey Kong or King Kong (DiMuro Deposition Transcript at 35).

Mr. Di Muro has located three steno pads which cover the periods 2/24/83 - 8/3/83, 8/11/83 - 8/27/84 and 8/27/84 - 4/17/85. I am enclosing the pages from those pads which contain references to King Kong or Donkey Kong, other than those references which cover discussions Mr. Di Muro has had with me or other attorneys in my firm relating to (a) this lawsuit, or (b) other matters about which Mr. Di Muro has sought legal advice from my firm after the commencement of this lawsuit. We accept that you are entitled to question this witness on communications he may have had with respect to (a) the subject matter of Universal's rights in King Kong, and (b) advice given with respect to the assertion of those rights. But we do not believe that you are entitled to inquire into communications between Mr. DiMuro and myself or other attorneys who serve as Universal's counsel about the day-to-day progress of this lawsuit, our strategy, preparation of witnesses, documents, etc. These remain privileged under both the attorney-client privilege and as work product, irrespective of the fact that we waived the attorney-client privilege on certain communications that occurred back in 1980 or 1982 relating to Universal's claim of rights.

Document Request

> Di Muro's "time notebooks" - references to King Kong or Donkey Kong with Sifuentes, Sheinberg, Adler, Wassermen, Kroft, Mittleman or Fairhurst from Janury 1, 1980 to April 18, 1985 (Di Muro Deposition Transcript at 36-39).

These are the logs Mr. Di Muro kept in order to bill for his time. The entries are cryptic, especially after 1980, but I am enclosing the references you requested, again except for those to Fairhurst (and other Townley & Updike attorneys) as these again pertain to contacts between Mr. Di Muro and myself regarding this action (they all date after June 1982), or relate to legal advice sought by Mr. Di Muro regarding other matters. Di Muro's time notebooks also have references to the Universal v. RKO state court action and its aftermath, some of which refer to "Kroft." I am not producing these entries, of which there are quite a few, because they obviously relate to communications Di Muro had with Kroft concerning that litigation. There were no entries referring to Donkey Kong and Kroft but had there been we would have produced them. There was a single entry (7/9/80) to Kroft and King Kong and we produced it.

Document Request

A better copy of Mr. Di Muro's June 18, 1980 memo (Di Muro Transcript at 52).

A copy is enclosed.

Document Request

Ms. Stein's memo to Ms. Conklin dated November 9, 1982 (Di Muro Deposition Transcript at 93).

This letter was produced to you under the cover letter of Sandra Edelman dated October 17, 1984. For your convenience, I am enclosing another copy.

Document Request

The letter from Stuart Kricun to a "Concern in San Diego" (Di Muro Depostion at 143).

A copy of the letter requested is enclosed.

As to the other documents, the ones I would identify but not produce, these are as follows. First there are two letters from Stephen Kroft of Rosenfeld, Meyer & Susman to Joseph Di Muro, each of which has an enclosure. The first letter is dated June 11, 1980 and the second is dated June 24, 1980. The enclosure to the June 24 letter is another letter, from Louis Petrich of Youngman, Hungate & Leopold to Kroft which, of course, is not privileged and I am enclosing a copy of it.

As to the letters themselves, they do relate to "merchandising rights" in King Kong, as I suspect you might infer from the dates. I am willing to produce them, but I would request of you the same stipulation that I requested - and you gave - during Di Muro's deposition regarding the notes exchanged between Di Muro and Hadl with respect to the Coleco agreement, i.e., that our production is without prejudice to Universal's right to assert its attorney-client privilege with respect to other communications which it may have had with Mr. Kroft not having to do with (a) advice or opinions on Universal's right in the King Kong name, character or story or (b) the bringing of this lawsuit. In other words, I accept

that Universal has waived its attorney-client privilege on the matter of advice given on rights in King Kong (prior to the institution of this lawsuit) or the bringing of this lawsuit. But I would be concerned to hear it argued (by you or anyone else for that matter) that the disclosure of these two documents constitutes a waiver of all other privileged communications between Kroft and Universal on every matter relating to Universal and King Kong. A decision by Judge Cannella, United States v. Aronoff, 486 F. Supp. 855 (S.D.N.Y. 1979), in which the Court refers to the fact that an attorney could have protected his position by specifically producing certain documents on a "without prejudice" basis, seems to support this procedure. Incidentally, we secured these two letters from Kroft pursuant to a document request put to Universal by Coleco.

A third document which bears the words "PRIVILEGED AND CONFIDENTIAL" and the date April 8, 1982 from Di Muro to Sheinberg also came to our attention as a consequence of a discovery request put to Universal by Coleco. While it does not deal with the subject of advice on merchandising rights, I believe Nintendo is entitled to it because (a) it falls within a document request made by Nintendo of Universal covering documents relating to any proposed King Kong motion pictures and (b) it communicates advice on King Kong rights within what I regard as the legitimate parameters of what we have waived when we produced Di Muro's other memo to Sheinberg of June 1980. Hence, I am enclosing it. I would request, however, that the contents of this memorandum be treated as confidential and subject to the stipulated protective order into which we entered some time ago relating to other confidential documents we have produced to you.

Finally, one of the entries on Mr. Di Muro's steno pads, dated February 29, 1984, covers a communication between Mr. Sheinberg and Mr. Di Muro on the subject of Dino De Laurentiis and a King Kong motion picture under discussion between the two at that time. I am identifying it here because it qualifies as a "King Kong" reference which you requested during Mr. Di Muro's deposition. I am declining to produce it, however, on the grounds that it is a privileged communication between attorney and client, has nothing to do with any issue in this lawsuit, and, of course, occurred a year and a half after this suit was already in progress.

Lastly, there is a memo from Adler to Sifuentes of November 20, 1980, dealing with the Ben Cooper King Kong license which we found in our files here but which I do not

believe we produced for you. This was an omission but I do not think it has much significance.

I suggest you give me a telephone call to let me know your position with respect to the two Kroft to Di Muro letters.

Very truly yours,

DOUGLAS C. FAIRHURST

DCF:cg
Enclosures